74-1134

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

VERA PAVLICKA,

Petitioner,

v.

NEW YORK UNIVERSITY MEDICAL CENTER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CONRAD J. LYNN
Attorney for Petitioner
233 Broadway
New York, New York

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented For Review	2
Statutes Involved	2
Statement	2
POINT I	3
POINT II	4
POINT III	5

TABLE OF CASES

Bern v. *Evans* (C.A. Neb. 1965) 349 F. 2d 282	3
General Motors Corp. v. *Walden*, 406 F. 2d 606 (1969)	4
Gillentine v. *McKeand* (C.A. Mass. 1970) 426 F. 2d 717	4
Hartman v. *Miller Hydro Co.*, 499 F. 2d 193 (1974)	4
Izillo v. *Tailored Woman*, 326 N.Y.S. 2d 160 (1971)	4
Krasowski v. *Greyhound Lines, Inc.* (C.A. Ohio 1968) F. 2d 445	6
Mandel v. *Penn. R. Co.* (C.A.N.Y. 1961) 291 F. 2d 433, denied cert. 82 S. Ct. 379	3
Meyer v. *Brown-Harter Cadillac*, 32 App. Div. 2d 1045 (1969)	4
Northern Pacific Ry. v. *Nerman* (C.A. Mont. 1973) 478 F. 2d 1167	4
Parisi v. *Lombardi*, 339 N.Y.S. 2d 965 (1973)	4
Soto v. *Correa*, 20 A.D. 2d 694 N.Y.S. 745 (1964)	6
Wills v. *YMCA of Amsterdam*, 321 N.Y.S. 2d 895 (1971)	4

APPENDIX

PAGE

Transcript, Heustis, direct (190-193) 8

Transcript, Pavlicka, cross (208-213) 10

Transcript, Pavlicka, cross (220-226)

Transcript, Pavlicka, cross (228) 18

Transcript, Pavlicka, redirect (234) 19

Transcript, Pavlicka, redirect (238) 19

Transcript, Tam, direct (340) 20

Transcript, Yaslow, cross (439-442) 20

Transcript, Yaslow, cross (467-470) 24

Transcript, Court's Charge (537-538) 26

Transcript, Court's Charge (551-554) 27

Transcript, Plaintiff's exception (565) 29

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

VERA PAVLICKA,

Petitioner,

v.

NEW YORK UNIVERSITY MEDICAL CENTER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, citizen of the State of New Jersey and of the United States, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit rendered December 10, 1974 which affirmed the judgment below for respondent.

Opinions Below

There was no opinion in the trial court, the United States District Court for the Southern District of New York. The United States Court of Appeals for the Second Circuit had rendered no opinion.

Jurisdiction

The final judgment of the Court of Appeals was entered December 10, 1974. Jurisdiction is conferred upon this Court under Title 28 U.S.C. Section 1254(1), 42 U.S.C. Section 1983 and United States Supreme Court Rule 19, Subdivision b.

Questions Presented for Review

1. Was it reversible error for the Court to charge on contributory negligence?

2. Did the Court exhibit a bias which prevented the plaintiff from having a fair trial?

Statutes Involved

Section 1254 of Title 28 of U.S.C. provides for review by this Court of cases in the United States Court of Appeals.

Statement

The petitioner was a patient in the hospital of the respondent undergoing treatment for a back injury. She alleged that while she was being lifted on a big sling out of a whirlpool bath, a metal box, a part of the contraption, swung free and struck her behind the ear, causing serious and permanent injury. She alleges that the accident happened because one of the two attendants who ordinarily lifted her out of the bath was not present and a single attendant was controlling the lifting operation when she was struck.

The trial before a Judge and Jury lasted five days, from November 8, 1973 through November 14th. The jury rendered a verdict for the defendant. The petitioner seeks a reversal and a new trial.

POINT I

The trial judge had no basis for charging on contributory negligence.

The sole witness to the accident which was the subject of this action was the plaintiff. She testified that on the day of the accident she was brought into the physiotherapy room for her Hubbard bath and that she laid down on her back in a completely horizontal position. She was asked by the court if she at any time raised herself to a sitting position. Her answer was "no." The Court continued:

> "Q. Did anyone raise you to a sitting position? A. No.
>
> Q. So at all times even to the time that the incident happened, you were completely prone and horizontal or parallel to the ground? A. That's right." (Appdx. 210, 211)

No proof was adduced by the defendant to contradict the account of the plaintiff's position. The trial judge, however, had it fixed in his mind that the plaintiff must have sat up. In his charge to the jury he asked it to consider the likelihood or possibility that she was sitting up (Appdx. 553). In so doing he committed reversible error. *Bern* v. *Evans* (C.A. Neb., 1965), 349 F. 2d 282.

This Court held it to be reversible error when a trial judge allowed a jury to determine if there was negligence to be attributed to a railroad in the extraordinary swaying of a coach when there was no evidence of swaying. *Mendel* v. *Penn. R. Co.* (C.A. N.Y. 1961), 291 F. 2d 433. The

United States Supreme Court denied certiorari. 93 S. Ct. 379. See also *Gillentine* v. *McKeand* (C.A. Mass. 1970, 426 F. 2d 717; *Northern Pacific Ry.* v. *Herman* (C.A. Mont. 1973), 487 F. 2d 1167.

POINT II

In this case the Appeals Court, Second Circuit failed to follow the New York Rule.

Under rules of diversity of citizenship the appellant, a citizen of New Jersey, sued a New York Corporation in the Southern District Federal Court in New York. That Court was bound to abide by the rules of evidence obtaining in the New York courts. There is no doubt that the prevailing rule in the New York courts is that a court may not charge on contributory negligence unless evidence of contributory negligence has been adduced at the trial. *Meyer* v. *Brown-Harter Cadillac,* 32 App. Div. 2d 1045 (1969); *Wills* v. *YMCA of Amsterdam,* 321 N.Y.S. 2d 895 (1971); *Izzillo* v. *Tailored Woman,* 326 N.Y.S. 2d 160 (1971); *Parisi* v. *Lombardi,* 339 N.Y.S. 2d 965 (1973).

If the Court of Appeals for the Second Circuit has now adopted the position of the trial court, it is in clear conflict with the rule of the Court of Appeals for the Tenth Circuit. See *General Motors Corp.* v. *Walden,* 406 F. 2d 606 (1969); *Hartman* v. *Miller Hydro Co.,* 499 F. 2d 193 (1974).

It is respectfully urged under these circumstances that this Court exercise its prerogative under its Rule 19 (b) and grant certiorari.

POINT III

The trial judge showed a distinct bias against the plaintiff.

It was evident that the plaintiff had suffered from various severe ailments throughout her life. She had been a patient in a number of hospitals and had been attended by many physicians. The trial was concerned with her latest complaint. She was, no doubt, in pain during her ordeal in court.

The Court's irritation with her was demonstrated throughout her period on the witness stand. For example, when the Court was trying to find out how often she would take a Demerol pill, the following colloquy ensued:

> "The Court: I think she said that whenever she got a pain she took Demerol. If the pain got intense and she couldn't stand it.
>
> The Witness: When the pain got intense, but I didn't take it all the time because—
>
> The Court: Nobody is suggesting that you were eating it by the handfuls but that in between if you got pain and it was intense you would then take a Demerol pill?
>
> The Witness: Yes." (Appdx. 208).

The heavy sarcasm of the Judge's remark could hardly have been lost on the jury. Again, as the Judge was dismissing the jury for the weekend we have this comment:

> "The Court: We have run out of witnesses and unfortunately, you have to go home.
>
> "you know what the woman said when the man retired. She said 'Honey, I married you for better or for worse but not for lunch.'" (Appdx. 238).

A few minutes prior to that tidbit there is this other comment of the judge about the plaintiff:

> "The Court: But I want you to get finished with her because I don't want her to go home thinking she is going to be brought back on the stand all over the weekend. She is bugged enough as she is so don't bug her any more . . ." (Appdx. 228).

The case was closely contested. The Judge may well have had no evil intent in his sexist remarks but he is obligated to be aware of the times in which we live. Because the Court was anxious to wind up as much of the trial as he could that Friday afternoon, was no excuse for prejudicing the jury against the plaintiff and her counsel. See also Appendix 442.

In *Soto* v. *Correa,* 20 A.D. 2d 694, 246 N.Y.S. 2d 745 (1964), the Court found no fault with the verdict. But it ruled:

> "Nevertheless, we are constrained by the record to grant a new trial as we have said 'inevitably a trial court sets the pattern for the jury' (Livant v. Adams, 17 A.D. 2d 784, 232 N.Y.S. 2d 641) and the trial judge should 'at all times * * * exercise a high degree of patience and forbearance' (Buckley v. 2570 Broadway Corp., 12 A.D. 2d 473, 207 N.Y.S. 2d 484). So the duty of a trial judge to expedite the business of his court and to utilize fully the court time should not be performed in a manner to prejudice a party in the fair and orderly presentation of his case or defense . . ."

A similar concern has been expressed by the Federal Appellate Courts. *Krasowski* v. *Greyhound Lines, Inc.* (C.A. Ohio, 1968), 402 F. 2d 445.

Timely exception was made by trial counsel to the manner in which the judge viewed the case (Appdx. 565).

Wherefore, it is respectfully submitted that a writ of certiorari should issue to the Court of Appeals in the Second Circuit.

Respectfully submitted,

CONRAD J. LYNN
Attorney for Petitioner
233 Broadway
New York, New York

Dated: February 14, 1975.

APPENDIX

EUSTIS—Direct.

Q. Are you familiar with the equipment in that particular room? A. Yes, sir.

Q. Could you describe if you would the tank, what it looks like?

The Court: Well, not what it looks like but what it looked like at the time in question.

Q. At that time, yes. A. Right. At that time, at this time, it's the same tanks are still used. It is kind of shaped like a butterfly, large enough to put a whole body in, and the people are put in by placing them on a stretcher-type affair which is called a carrier. They are then attached to a lift, brought over the tank, and lowered into the tank. It is like a huge bathtub but it is shaped to allow you to get in close to take care of a patient in it, as opposed to being round where you couldn't reach a patient.

Mr. Cullen: Your Honor, Miss Heustis provided me with a catalog yesterday which shows a picture of the tank and also shows a picture of the mechanism for lowering the stretcher in and out. I have made Xerox copies of that and if anybody wishes to offer them into evidence—

Mr. Reilly: Mr. Cullen, will you wait awhile? I will get to it.

Mr. Cullen: I thought we could expedite things if we had pictures.

The Court: All right.

Q. Would you go on with your description? A. I think that about covers it. It is a butterfly shape. It is big enough to allow a body to be submerged in the tank, everything but the head. The patient normally goes in on a carrier which is a stretcher arrangement made of either can-

vas or nylon. The stretcher is suspended by four hooks, and the whole thing is lifted into the air by a lift, one similar to what you see in a butcher shop holding a side of beef. It allows you to raise the patient up, slide the patient off and lower the patient into the tank.

Q. Is there a control box on that? A. Yes, sir, there is.

Q. Where is that control box located? A. Just about right under the housing for the chain which is part of the lift.

Q. Would you describe that for us in relation to size if you will? A. It is about eight inches long, and about two and a half inches wide, so it would be like that. It has an up and down switch on it, usually black in color, and it is rubber (indicating) for insulation purposes.

Q. What is under the rubber? A. I have never taken one apart.

Q. Do you know the weight of it? A. I have never weighed one but I'd say maybe a pound. I have never put one of the scales.

Q. Have you measured it since you were examined before trial? A. I measured it today as a matter of fact, because the specifications on the box itself are not mentioned in the catalog.

Q. So when you gave an answer that it was six inches long— A. No sir, eight inches.

Q. —four inches wide? A. Eight and two and a half inches.

Q. When did you measure it? A. Just before I came over.

Q. Is this the same piece of equipment that was there on the date of the accident? A. I can't—I can't answer that. See sometimes if they—

The Court: That is enough. Don't explain anything. How thick is it? You said it is two and a half by eight but how thick?

The Witness: Two and a half all the way around. Two and a half wide, two and a half deep.

The Court: And eight inches long?

The Witness: Yes, sir.

Q. Do you know who operated the controls on the day of the accident? A. No, sir.

Q. Would the incident sheet which is, I think, deemed as part of the hospital record—and I wonder if for purposes of—I show you this incident sheet and ask you if that would indicate who was operating the controls on that particular occasion. A. No, sir.

Q. Who signed the report? A. Mrs. Peach, senior therapist in the area.

Q. And when someone is involved in something like this, do they usually leave out the name of the party who was involved in the incident?

The Court: Sustained.

PAVLICKA—Cross (208):

Q. Were these tablets in addition to the injections of Demerol that Dr. Mendoza gave you after the accident? A. These Demerol tablets are you saying?

Q. You told us before lunch in response to several of my questions, we had a difference of whether they were tablets or pills, that you had taken it in pill or tablet form, I am confused myself now, that you had taken Demerol in a pill or tablet form after the accident. Is that correct? A. Yes.

Q. And in addition, you just have told us that some of these needles that Dr. Mendoza gave you were Demerol. A. But it wasn't in addition.

Q. I asked you is that so, did you tell us that? A. Yes, but I misunderstood.

Q. You were what? A. I misunderstood. Not in addition. In place of.

The Court: Let me ask you this: Is my understanding correct that when the doctor injected you with the Demerol, that same day you never took any Demerol, but if you got any pain in between you would take a Demerol tablet?

The Witness: No, not that often.

The Court: Never mind often or whatever.

The Witness: Yes.

The Court: Whenever you got some pain you then took a tablet?

Mr. Reilly: Well, your Honor, in relation to that question, it would seem to me that you are forcing an answer as to whenever she got a pain. That is not the fact and I don't think she's testified to that.

The Court: I think she said that whenever she got a pain she took Demerol. If the pain got intense and she couldn't stand it.

The Witness: When the pain got intense, but I didn't take it all the time because—

The Court: Nobody is suggesting that you were eating it by the handfuls, but that in between if you got pain and it was intense you would then take a Demerol pill?

The Witness: Yes.

The Court: That is what I thought she said in the beginning and I haven't heard anything different since.

Mr. Cullen: And I asked her in addition to that was Dr. Mendoza injecting her with needles containing Demerol.

The Court: She said that on occasions he did and she has already testified to that.

Mr. Reilly: This has gone on for almost an hour and a half, your Honor, before lunch, after lunch.

The Court: No, it has not gone on an hour and a

half but it has gone on about ten or fifteen minutes so let's get into some other area.

Q. The day that they had you down in the physiotherapy area of the N.Y.U. people, when you were placed from your stretcher that they brought you down in onto the bed or hammock or whatever you want to call it, to put you into the Hubbard bath, were you reclining? A. Yes.

Q. Were you completely horizontal or parallel to the ground or were you tilted in any fashion? A. I was completely flat. Completely level.

Q. Did you have any pillow behind your head? A. No.

Q. You were not seated? A. No.

Q. Did you at any time before, during, or after the bath in the Hubbard tank, raise yourself to a sitting position? A. No.

Q. Did anyone raise you to a sitting position? A. No.

Q. So at all times even to the time that the incident happened, you were completely prone and horizontal or parallel to the ground? A. That's right.

Q. You had been down on other occasions to that area for the same bath? A. That's true.

Q. In lying on your back, were you able to discern this control box that allegedly struck you? A. Yes. As you are laying flat, and you look up.

Q. Looking up, and how high from your position on the stretcher was the control box? A. I don't know.

Q. You were there how many times? A. I'm not sure, five, seven.

Q. And in that five or seven times, did you have any occasion to notice the distance from the top of your body, as you lay, I assume on your back, the position of this box that allegedly struck you?

Mr. Reilly: May I object, if the Court pleases.

In what positions did she see it? It could have been moving at all times.

The Court: I don't know. Up to the point here, she hasn't made any answer so we can't even have a point of departure, so I will allow a question whether she observed it at any of those times that she went down there, the position of it above the tank. That is all he is trying to find out at this time as I understand.

Mr. Reilly: At what time?

The Court: Anytime.

Mr. Reilly: All right.

The Court: At any time. Then you can determine if it was before she was put in, after she was put in, or during the time she was put in.

Q. Well, it is at different levels because when the hammock or—

Q. Excuse me. The answer is it was at different levels? A. That's right.

Q. You never operated a Hubbard tank yourself, did you? A. No.

Q. Did you ever see this box that allegedly struck you in the neck? A. Yes.

Q. Ever in motion like a pendulum? A. Yes.

Q. In other words, it was without control of any man on duty and it swung back and forth? A. No, no.

Q. What do you mean when you saw it in motion? A. One gentleman would move it while one gentleman would guide the stretcher over the tank.

Q. One gentleman would move it? By that you mean the switch box? A. It can—the whole cable or—and the box moves in conjunction with the hammock to place you over the tank?

Q. In other words, as the hammock moved, the overhead contraption moved? A. Yes.

Q. Did the box move? A. Yes.

The Court: Wait a minute. She is talking about things which the jury probably has as much idea of as if they weren't here.

PAVLICKA—Cross (220-226):

Q. You were placed from the stretcher you were brought on into the stretcher which was going to put you in a tank? A. Right.

Q. How many men lifted you? A. Two.

Q. At the moment you were placed on the stretcher that was going to transport you into the tank, did you have an occasion to observe the mechanism that you were looking up at in the ceiling? A. Yes.

Q. At that moment, how far was this control box from the highest point of your body as you lay prone on the stretcher? This is before any motion. A. I would say it was held about—I have to demonstrate with my hand. I am trying to remember. About this far away from me.

The Court: Do it this way, the distance from your body.

A. About this far away from here.

The Court: Just hold it there a minute although if you get tired you can put them down. Can we agree on the measurement?

Mr. Cullen: Two feet?

Mr. Reilly: Whatever Mr. Cullen says.

The Court: All right, approximately two feet.

Q. Do you know if this control box was rigid, set on a steel rod? A. It wasn't.

Q. Did you ever operate it yourself? A. No.

Q. Did you ever actually see it bend in any fashion or sway or swing back and forth? A. Yes. Yes.

Q. On what occasion? A. As they would—well naturally —as they would—they'd push it and swing it.

Q. They'd push what? A. The whole cable and the box.

Q. One moment. The whole cable and the box. Let me show you Plaintiff's Exhibit 5. I refer you to the picture on the topmost part of the page. A. Right.

Q. When you refer to the whole cable, what do you mean? A. I mean—you see this extension? I call—let's say it is an extension cord for want of a better word. The box here, that whole thing, don't forget it's pliable.

Q. What a minute.

Mr. Cullen: Move to strike that.

A. All right, I am sorry. The whole thing can go back.

Q. Do you mean that the whole stretcher ensemble? A. No.

Q. Can move back and forth? A. Well, yes, that can move back and forth by operating buttons on the—

Q. Control? A. The control on which they also glide but as they place you on the stretcher, a person holds this back.

Q. That is the third person? A. Third person, yes. And you are slid by these two gentlemen on the stretcher because there is not too much space between these supports to slide in.

Q. You are referring to what you have marked on there as "B"? A. Yes. There is not that much space between "A" and "B". Item "C" is not that long if you want to put it that way.

Q. In other words, Miss Pavlicka, between "A" and "B", "A" being the support from which the stretcher is suspended, and "B" being the stretcher itself, there is not enough difference, as you say in room, to manipulate? A. You never—

Q. Would you say the difference was about two feet? A. Roughly about two feet.

Q. And you tell us that this takes a patient and within two feet of space between top of the support which holds up the stretcher and the stretcher itself, there is only two feet to get a person in there? A. No, I see—let's call them cords or chains that hold the stretcher to the action above. They don't go—they didn't go directly all the way up. They came this way and there was a chain, it was like an upside-down "Y". Instead of four going up on each side, it was two and then a "Y", upside-down "Y". You were never placed in a pool or tank sitting up. You were always placed in it laying down and you always, if you were going into the big pool, you were eased off and you were slid off.

Q. You are speaking of September 13, 1968? A. That I stayed on the stretcher.

Q. You didn't see anybody slide off? A. I said you were slid off, sir, when you were going in the big pool.

Mr. Cullen: I move to strike it out. It is a conclusion on the part of the witness.

The Court: No, she is talking about another area. In the tank you are put in this way. In some other thing you are slid in but we are not interested in the other thing at all. We are interested only in the one that you were in.

Q. Two men took you from the stretcher which had transported you from your room, put you upon the stretcher which would dip you in the bath? A. That's correct.

Q. There was another gentleman there, also, wasn't there? A. Yes.

Q. So we have three gentlemen, and when this incident occurred, there was only one there, is that your contention? A. Yes, sir.

Q. And two of them had in some unknown fashion disappeared?

Mr. Reilly: I am going to object to the form.

The Court: That is a figurative way of speaking but two of them were not there.

Q. Two of them weren't there. A. All right. Two of them weren't there.

Q. And you testified on direct examination that something hit you, you weren't—tell me again about that incident. When for the first time did you see this object that allegedly hit you? A. I saw it coming toward me about a second before impact.

Q. Did you have any opportunity to avoid it? A. No, I turned my head.

Q. Would you say it was a moment after this sight? A. A split second I saw it. I turned my head.

Q. Do you know if it was the box? A. It was the box.

Q. In other words, although it was a split second you had sufficient time to determine that it was a box? A. It was the control box, yet.

Q. You had sufficient time to determine it was this control box. You got up to the service station, this is what you told us, you left the incident area where you were screening and you felt you were blacking out and so forth, and you were now taken up to the service station.

The Court: The nurses' station.

Q. The nurses' station. A. The nurses' station.

Q. Did you give a statement to anybody at the station as to what occurred? A. Yes.

Q. What did you tell them at the nurses' station? What did you tell them? A. I told them to the best of my recollection I was being—I was being lifted out of the whirlpool tank. I vaguely recall the twelve o'clock bell sound-

ing, and one fellow was guiding me and operating the controls, at the same time moving me over on the way from the tank.

I saw the control box swinging toward me. I turned my head. I got hit in the back of the head and back of the neck by the ear on the right side. I screamed. Things got black. I didn't pass out. I know I cried.

And there was some activity around me, but—

Q. In other words you saw the box long enough to turn your head? A. Yes.

PAVLICKA—Cross (228):

The Court: We will take a five minute recess. Please don't discuss the case in the meantime.

(Recess.)

(After recess.)

Mr. Cullen: I have finished my cross.

Mr. Reilly: I might forget a few things but I just want to hit a few things now, your Honor, and I think everybody wants to get home here.

The Court: But I want you to get finished with her because I don't want her to go home thinking she is going to be brought back on the stand all over the weekend. She is bugged enough as she is so don't bug her any more. Get finished with her today.

Mr. Reilly: All right, fine. I will stop on this, your Honor.

The Court: I am not suggesting anything except this: I do not want this woman recalled in this case on Monday. I expect both of you to be finished today. I am going to wait here until you are.

Mr. Reilly: All that I am saying, your Honor, is that I have made notation of three different items. If during the weekend there is something—

The Court: No, no, I am not going to do that because I think she has gone through enough now. You are either going to conclude today or—if, for example, a doctor says something that she wants to clarify later on, then I will allow her to be called but not on this direct and redirect case. Let's let her get through with this thing.

Mr. Reilly: All right, your Honor. I might take a minute or two.

The Court: Take as much as you want. We are still here.

PAVLICKA—Redirect (234):

Q. When you were asked, do you claim that the reconstruction of the eye was necessary and three different times that you had surgical intervention, was caused by the accident, can you answer that question?

The Court: No, I won't let her answer it.

PAVLICKA—Redirect (238):

The Court: We have run out of witnesses and, unfortunately, you have to go home.

You know what the woman said when the man retired. She said "Honey, I married you for better or for worse but not for lunch."

All right, please don't discuss this case amongst yourselves nor with anyone else nor form or express any opinion in this matter until it is submitted to you for your decision.

Please return back here on Monday morning at ten o'clock.

(Adjourned to Monday, 11/12/73, at 10:00 A.M.)

Tam—Direct.
Yoslow—Cross.

TAM—Direct (340):

A. As a matter of fact, I received a report first and she told me something when she was transferred in rehabilitation services, that is, when she was receiving physical therapy and during the transfer, a suspender, which she was sitting on it and something hanging on that suspender fell off and dropped on her neck, on the right side of her neck.

Q. And you said before she told you you received a report from somebody? A. Yes.

Q. Who was that who gave you the report? A. The floor nurse.

Q. Do you know the name of the floor nurse? A. I don't.

Q. Would that be in the record? A. It is possible. I am not quite sure.

Q. What part of the record would that be in? A. The nurse's notes.

Q. Would you look at the nurse's notes to see if you could find that?

The Court: What you just told us now, did you remember that in your own mind or is it written down there someplace?

The Witness: I remember by myself.

Mr. Cullen: It is in the hospital record, part of the summary chart as provided by Miss Pavlicka. It should be on the doctor's summary chart which he had which I think we marked for identfication.

YOSLOW—Cross (439-443):

Q. Were you advised shortly before you operated on Miss Pavlicka by a report from John Hopkin's that in their opinion there was no fusion?

Mr. Cullen: Just one moment. This is not in evidence. The doctor has statements from various places. The admission of these doctors' opinions has been refused by the Court on the ground that these opinions submitted to the doctor was based upon hearsay.

The Court: That is right. That is what I ruled on Mr. Reilly's objection so if it is in that class, I naturally would have to rule the same way.

Doctor, this copy was in your file. Did that report come to you just before the hospitalization of 1968?

A. Yes, sir.

The Court: What is the number?
Mr. Cullen: It is the doctor's office record.
The Clerk: It is E, your Honor.
The Court: Mark it E-2.

(Defendant's Exhibit E-2 marked for identification.)

The Court: What is the question?
(Read back.)
The Court: He answered that question.

Q. Does that report indicate that there was no fusion?

Mr. Cullen: Objection.
The Court: Sustained.

Q. Did you receive a report from John Hopkin's? A. I don't recall offhand.

The Court: Are you making him your own witness in this area? Nothing about this has been brought out on direct examination. The point of

the matter is, if you are going to try to get some opinion from him, he hasn't been asked one question on his opinion as to anything.

If you are going to do that, you are taking him on as your own witness and you are doing it on your own and I would suggest that you do it as part of your case and not as part of his case.

On this back injury, I don't know essentially what it has to do with our claim right here.

Mr. Reilly: I think it is the whole picture.

The Court: That is something you want to bring out, you call him and produce him as your witness.

He has been asked about certain entries, what they meant and what medical terms meant.

Mr. Cullen: He has rested and anything now comes as rebuttal.

The Court: I am suggesting that to him and that is why I want to see if he wants to call him as his own witness in rebuttal, he can do it if he is trying to get opinions from him.

Mr. Reilly: If the Court please, I am getting facts in relation to this woman's condition and in relation to the cause of pain.

The Court: It is not cross examination, that is what I am suggesting to you. It is something you have a right to bring out if you want to do it but not at this time. At this point you are cross examining him on things that were brought out during the examination by Mr. Cullen, period. Then if you want to call him for any reason, you have a right to do that, but he is your witness in that case.

Q. During the course of the period when you saw her in 1966 up until April of 1972, did you refer Miss Pavlicka to various doctors? A. Yes, sir.

Q. During the period from '66 to '68, did you make such referrals?

Could you tell me the names of the doctors you referred her to? A. As I recall there was only one doctor I referred her to relative to the operation of 1966. I referred her to Dr. Hoen and we operated on her together.

Subsequent to that, I don't recall. I would have to refresh my memory.

Q. Would you want to look at your records—

The Court: These negative questions really murder you. He has to go through the record all over again because he has no present recollection of this. If you want that, go ahead and do it, but a negative question like that—if you know who they are, why don't you suggest it to him?

Mr. Reilly: I don't know know in view of the voluminous numbers.

The Court: Give it to him and let him go through with your negative questions which means he has to go through every single piece of paper to find out if he did or did not refer.

Mr. Reilly: Your Honor, I am sorry that you are irritated at me.

The Court: I will show on the record I am. Here is a case where you have the doctor's records for three or four days and now for the first time you are starting to ask him questions and looking through the file to find out these things. You could have looked at each piece of paper and seen the doctor's name on there and said didn't you refer him to Dr. Chin, didn't you refer him to Dr. Moldaver and didn't you refer him to so and so. That is not what you are doing. I am irritated if you want to make a record and I know exactly what you are doing.

Mr. Reilly: I apologize.

The Court: You don't have to apologize but please get on with this. These negative questions, it has happened about five times now. He has to look through every piece of paper in the record and there must be 50 or 55 sheets in there.

Mr. Reilly: I understand that.

The Court: Give it to him and let's go through this one now.

The question is: who else did you refer him to except the one doctor you remember, Dr. Hoen?

YOSLOW—Cross (467-470):

The Court: Did you ever go into that physiotherapy room?

The Witness: Yes.

The Court: And you are familiar with the Hubbard bath? above it?

The Witness: Yes.

The Court: Are you familiar with the equipment above it?

The Witness: Yes.

The Court: Essentially what it is like, four guide wires that are on a trolley that goes along a track, is that the way it is attached?

The Witness: Yes, to a motor.

The Court: The mechanism. We are talking about your recollection what this mechanism looked like at the time in question, are we clear on that?

The Witness: Yes.

The Court: That switch that caused the machine to run along the trolley and also to go up and down so there can be immersion, was that on some sort of a flexible wire?

The Witness: Yes.

The Court: At the end of that flexible wire, there was this box?

The Witness: Yes.

The Court: That had buttons for up and down and then along the trolley?

The Witness: That is right.

The Court: Can you describe to the jury what you saw as far as that flexible wire is concerned from this viewpoint?

Did that flexible wire move up and down so it changed the distance between the box and the bottom of the stretcher or was it a fixed wire that stayed in a same position?

The Witness: I believe it was mounted on elastic so it could be hand held as the patient was raised up and brought to the Hubbard tank or pool and lowered in there. I believe it was on some sort of flexible cable.

The Court: That could be pulled down and pulled up?

The Witness: Yes.

The Court: Could you pull it all the way down to the stretcher if you know?

The Witness: I don't know.

The Court: If you saw a diagram of it in a hospital catalog, would that, do you think, help refresh your recollection?

The Witness: It might.

The Court: Show him those diagrams.

Mr. Cullen: This is Plaintiff's Exhibit 5.

The Court: The second page, we are describing a portion where the little box on a flexible wire is. Do you see that?

The Witness: Yes.

The Court: Is that the way you visualize it as it is in that diagram?

The Witness: Yes.

The Court: Indicating the box that is here, could that ever be brought down all the way to the stretcher?

The Witness: No, not as it is here.

The Court: A witness testified something about two feet. Do you have any recollection about a distance of two feet as far as that box is concerned?

The Witness: I would say about two feet above the stretcher would be correct. I remember seeing it in use and seeing it in that position.

The Court: And it couldn't go down any further as far as you know?

The Witness: Not as far as I know.

The Court: So the jury can understand what we are talking about, you remember this diagram and that switch is in here and if you look at it whenever you desire to do so, you will understand what he is talking about.

Any other questions of the doctor?

Mr. Reilly: No further questions.

Mr. Cullen: No questions.

The Court: You may step down.

(Witness excused.)

The Court: I think we are back with the plaintiff's case.

Mr. Reilly: The only thing that is left open if we could have some time, it has to do with the medical expenses.

The Court: I thought you had agreed on something.

Mr. Cullen: We are talking about the bills.

The Court: I thought you had agreed.

Mr. Cullen: We are pretty well agreed. Perhaps we can do it outside the presence of the jury.

The Court: Tell me what you agreed, then we could tell the jury about it.

(At the side bar.)

Mr. Cullen: We are subtracting the cost of the hospital from August 15th to September 13th. We are also from the prescriptions—I understood you wanted

* * * * * *

CHARGE OF THE COURT (537-538):

So I do thank the lawyers for helping me. From time to time they came to the side bar as you recall and we discussed matters of law, and I want to thank them also on your behalf because I think you are persuaded as I am that they acted though there appeared to be some acrimony, it appears it was only professional acrimony and nothing more.

Court's Charge.

I told the lawyers yesterday what I was going to say today, and in fact I made myself an idiot card. I wrote it on the board so they would know exactly what I was going to say, but I started off with the facts and I indicated to them since the facts were essentially of such a limited nature as far as the incident was concerned, that I wasn't going to say anything about the facts particularly, I would leave that up to them and they have covered the facts and you are familiar with them.

I may mention some facts from time to time but it is only to indicate to you the manner in which the law is applied. My recollection of the facts doesn't bind you any more than lawyers' recollection of the facts.

You will use your own judgment on that and your own recollection.

When you analyze the facts, you quickly come to the conclusion that there are very many areas here that both sides agree upon.

They agree, for example, she was in the hospital. They agree she had this operation. They agree that prior to that she had this unfortunate bout with diphtheria, she lost an eye and they agree on many things, but there are two areas in which I would use the term advisedly violently disagree. The first is the question of whether or not there is responsibility here for this. Is this the tort which is described as a civil wrong for which there is a remedy in law.

The hospital says no and the plaintiff, of course says yes, and this conclusion comes from facts that they consider in coming to this conclusion • • •

COURT'S CHARGE (551-554):

In this regard there may be more than one proximate cause and if there is, each of them is a competent producing cause. In other words, it doesn't have to be en-

tirely produced by one person. This becomes relevant in this case because if you recall, the second element in here was that she contributed to the happening of the accident and, if so, she could not recover and that was because she was also a proximate cause of the injury if you so find after going over the facts, did she do anything to bring this accident about.

You will recall how she testified on the stand and how she described this happening. You have a right to look at any of the evidence to see how the equipment looks and how it operates and what not from the evidence in the case and you will have to determine whether or not she in any way contributed to this.

In order to look into this part of the matter, I will indicate to you what contributory negligence is, how it is described in the law.

Under the law, the plaintiff was required to exercise reasonable care for her own safety. That is, the same degree of care that a reasonably prudent person would have exercised for her safety under the same conditions.

The law does not permit you to weigh the degree of fault of the plaintiff and a defendant but requires that if you find that the plaintiff was guilty of any negligence, your verdict must be for the defendant even though you find that the defendant was also guilty of negligence.

If, however, you find that the plaintiff did exercise reasonable care under the circumstances and you find that she acted under the time and place and circumstances of the particular incident in a reasonably prudent fashion, then she would be free of negligence and if you find then that the defendant was at fault, you would, of course, find that they would be responsible for it.

So here again you must look into proximate cause because if you find there was negligence on her part, for the sake of argument, suppose in a situation like this you find, and I don't suggest you must and I am only dis-

cussing the evidence generally and not in particular importance.

Suppose for the sake of argument you remember she is sitting back in the chair showing you how it happened and she said it came from her right and turned her head around and it hit her head.

Suppose for the sake of argument she sat up into this device. That, of course, would be her own conduct.

* * * * * *

PLAINTIFF'S EXCEPTION (565):

She had been there five or six times before. She knew how the thing worked. She knew what she was supposed to do according to what she said about having been there and she remembers it as being prone on her back at all times.

I will not go into any detail in this area because I will have you rely on the argument made by counsel. You heard the intensive argument made in front of you and you can do anything you remember of the facts in this case.

I only made the remarks to you to indicate what we mean by contributory negligence where a person adds to or becomes part of the fault.

(At the side bar.)

The Court: Note your exceptions.

Mr. Reilly: In an example the Court gave as to the description that she testified to, you indicated it could have been something different such as sitting up and the indication that I got, there was no testimony in there in that respect at all and was speculative and I got the further indication that giving them his example would make them think if she did this, this was contributory negligence.

Plaintiff's Exception.

The Court: Since you made the statement, I indicate that the record indicates clearly to me that from the doctor's description and description of the girl who came in with the record and supplied the photograph here that under no circumstances could this particular part of the device hit her since it was at least two feet away from her and there would have to be some other way in which this happened and I only suggested to the jury in looking into the evidence, they might consider anything that was likely to happen, an inference that could be drawn from the attempt and that is all. I didn't suggest to them that it did happen.

Any other exceptions?

LIBRARY
EME COURT, U. S.

74-1134

Supreme Court, U. S.
FILED
MAR 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

VERA PAVLICKA,

Petitioner,

v.

NEW YORK UNIVERSITY MEDICAL CENTER,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN J. CULLEN
Attorney for Respondent
150 William Street
New York, N. Y. 10038

MELE AND CULLEN
Of Counsel

TABLE OF CONTENTS

PAGE

Statement 1

Questions Presented for Review 2

POINT I—The petititon for a Writ of Certiorari should be denied 2

TABLE OF CASES

Baltimore & O.R.Co. v. *Felgenhauer,* 8 Cir., 168 F. 2d 12, 18 4

Barney v. *Staten Island Rapid Transit Ry. Co.* (C.A.N.J. 1963), 316 F. 2d 38, cert. den'd 85 S. Ct. 67, 375 U.S. 826, 11 L.ed. 2d 58 ..... 4, 6

Bern v. *Evans* (C.A. Neb. 1965) 349 F 2d 282 3

Conner v. *U.S.* (C.A. Tex. 1971), 439 F. 2d 974 op.sup. 442 F. 2d 1349 ..... 4, 6

Federal Mut. Implement and Hardware Ins. Co. v. *Fairfax Equipment Co.* (C.A. Okl. 1958), 216 F. 2d 207 ..... 4, 6

General Motors Corp. v. *Walden,* 406 F. 2d 606 (1969) 6

Hartman v. *Miller Hydro Co.,* 499 F. 2d 193 (1974) .. 6

Izzillio as adm. etc. v. *Tailored Woman, Inc.,* 37 A.D. 2d 839; 326 N.Y.S. 2d 160 (2nd Dep't. 1971) 5

Krasowski v. *Greyhound Lines Inc.* (C.A. Ohio, 1968), 402 F. 2d 445 8

Meyer v. *Brown-Harter Cadillac,* 32 A.D. 2d 1045 (2d Dep't. 1969) 5

PAGE

Miller et al. v. *Brazel,* 10 Cir., 300 F. 2d 283, 288 4

Mills Owners Mut. Fire Ins. Co. v. *Kelly et al.,* 8 Cir. 151 F. 2d. 763, 765 4

N.L.R.B. v. *Pittsburgh S.S. Co.* (1951), 71 S. Ct. 453, 340 U.S. 498, 95 L. ed. 479 7

Parisi v. *Lombardi,* 41 A.D. 2d 560; 339 N.Y.S. 2d 965 (2nd Dep't. 1973) 5

Rice v. *Sioux City Cemetery,* 349 U.S. 70, 79; 79 L. ed. 897, 904 7

Western Fire Ins. Co. of Fort Scott, Kan. v. *Word* (C.C.A. Tex. 1942) 131 F. 2d 541 ..... 4, 6

Wills v. *YMCA of Amsterdam,* 28 N.Y. 2d 375; 321 N.Y.S. 2d 895 (1971) 5

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

VERA PAVLICKA,

Petitioner,

v.

NEW YORK UNIVERSITY MEDICAL CENTER,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your respondent, a domestic corporation, duly organized and existing under and by virtue of the laws of the State of New York, and The United States of America, respectfully submits this brief in opposition to the granting of the petition for a Writ of Certiorari.

Statement

The petitioner was a patient in the hospital of the respondent, having entered said hospital on August 15, 1968 for a re-fusion of the lumbo-sacral area. A prior attempt

at a fusion of this latter area had failed. Surgery was performed on August 20, 1968 and, as part of her post-operative treatment, physiotherapy was prescribed. On September 13, 1968, the petitoiner, as part of the aforementioned therapy, was taken to the physical rehabilitation department of the hospital and placed on a stretcher and lowered into what is known as a "Hubbard Tank", which is a type of whirlpool bath.

The petitioner alleged that, while being lifted from the bath by mechanical sling (still lying supine on the stretcher) she was struck on her head behind her right ear causing her various and sundry injuries.

The petitioner claimed the incident occurred because one of the two attendants whom she had observed operating the "Hubbard Tank" apparatus on previous visits was absent at the time she was being lifted from said tank and, as a result of this absence, she was struck by the "control box".

The trial before the Hon. John M. Canella and jury commenced on November 8, 1973 and finished on November 14, 1973. The jury rendered a unanimous verdict for the defendant.

Questions Presented for Review

The respondent agrees with the questions as stated by the petitioner.

POINT I

The petition for a Writ of Certiorari should be denied.

Rule 19:1 (b) of this Court upon which, apparently the petitioner relies need not be quoted but it states, in substance, that this Court may consider situations as follows:

(1) Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

(2) Has decided an important state question in a way in conflict with applicable state law.

(3) Has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

I respectfully direct this Court's attention to Point II of the petitioner's brief in which he states in substance, that the Second Circuit Court, New York, failed to follow the New York rule. Within this argument he has advanced cases which he feels attacks both subdivisions (1) and (2) stated supra. First, he cites several New York cases to support his contention that a New York Court may not charge on contributory negligence unless evidence of such negligence has been adduced on trial. There is no quarrel with this premise. However, if such a charge is given an exception must be taken by the offended party. In his Point I which advances the argument that the trial judge had no basis for charging on contributory negligence he cites the case of *Bern* v. *Evans* (C.A. Neb. 1965). 349 F. 2d 282.

In the *Bern* case, cited supra the court states as follows at p. 288:

> "It is clear therefore, that this objection is precluded from our consideration by virtue of Rule 51, F.R.Civ. P., which provides, inter alia, as follows:
>
> 'No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.'

"We have previously held this rule to have the force and effect of law. See: *Baltimore & O.R.Co.* v. *Felgenhauer,* 8 Cir., 168 F. 2d 12; 18; and *Mills Owners Mut. Fire Ins. Co.* v. *Kelly et al.,* 8 Cir., 151 Fed. 2d 763, 765. Also see: *Miller et al.* v. *Brazel,* 10 Cir., 300 Fed. 2d 283, 288; and *Barron & Holtzoff, Federal Practice and Procedure* Vol. 2B, Sections 1101 to 1106, inclusive, p. 439 et seq."

The same case, pps. 288, 289 discusses contributory negligence and notes that the plaintiff had excepted to the instructions on such an issue, thus allowing the appellate court to consider such instructions.

The giving or not giving of an instruction to a jury will not be reviewed without seasonable objections. A party may not stand by without objection to rulings on request to charges or instructions to the jury and then, after verdict and/or judgment, when it is too late for the district court to change or correct its rulings or instructions, complain for the first time on appeal that the district court has committed error. *Federal Mut. Implement and Hardware Ins. Co.* v. *Fairfax Equipment Co.,* (C.A. Okl. 1958) 261 F. 2d 207; *Miller* v. *Brazel,* cited supra; *Western Fire Ins. Co. of Fort Scott, Kan.* v. *Word,* (C.C.A. Tex. 1942) 131 F. 2d 541. See also *Barney* v. *Staten Island Rapid Transit Ry. Co.,* (C.A.N.J. 1963), 316 F. 2d 38, cert. den'd 84 S.Ct. 67, 375 U.S. 826, 11 L.Ed. 2d 58. This rule that no party may claim error in the giving or failing to give an instruction unless he objects thereto before the jury retires for deliberation of its verdict should be scrupulously complied with. See *Conner* v. *U.S.* (C.A. Tex. 1971), 439 F. 2d 974, op. sup. 442 F. 2d 1349.

The appellate court of appeals charged the jury in the instant case on the law of contributory negligence (Appdx 551-554) remarking in the beginning of its charge that it had discussed the charge with opposing counsel on the

afternoon before at the side bar. (Appdx 537-538). No exceptions to such charge were taken by the plaintiff's counsel. (Appdx 565). Thus the charge of contributory negligence becomes the law of the case.

The petitioner (see Point II of his brief) cites the following cases:

(a) *Meyer* v. *Brown-Harter Cadillac,* 32 A.D. 2d 1045 (2d Dep't. 1969)

(b) *Wills* v. *YMCA of Amsterdam,* 28 N.Y. 2d 375; 321 N.Y.S. 2d 895 (1971)

(c) *Izzillio as adm. etc.* v. *Tailored Woman, Inc.,* 37 A.D. 2d 839; 326 N.Y.S. 2d 160 (2nd Dep't., 1971)

(d) *Parisi* v. *Lombardi,* 41 A.D. 2d 560; 339 N.Y.S. 2d 965 (2nd Dep't., 1973)

These cases are used to support his argument that New York law, in effect, stands for the principle that it is error to charge contributory negligence when none exists.

In (a) the *Meyer* case, cited supra, the court denied plaintiffs' request to charge that there was "no evidence in this case upon which a finding could be made that Jane Kranzler Meyer was contributorily negligent". Thus this latter case is not within the area of the petitioner's case where neither an exception nor a request to charge on contributory negligence was made.

In (b) the *Willis* case, cited supra, supports the fact that the court was in error to charge the jury on contributory negligence when there was no evidence to support it. But, again the plaintiff's counsel had requested a charge that the infant plaintiff was not negligent and it was refused by the court.

In (c) the *Izzillio* case, cited supra, I see no reason for its citation as the decision therein has nothing to do with the issues raised by the petitioner.

In (d) the *Paresi* case, cited supra, again contributory negligence was charged over the objection of plaintiffs' counsel and this was held to be error.

No quarrel can be had with the three cited cases (a, b, & d, supra) of the petitioner but the defendant must respectfully point out that either proper exceptions were taken or requests were made and the lower courts acted to the contrary. The federal courts have upheld this rule in the *Bern, Federal Mut. Implement and Hardware Ins. Co., Miller, Western Fire Ins. Co. of Fort Scott, Kan., Barney* and *Conner* cases, cited supra.

Thus the issue is whether the trial judge in the instant case erred in charging contributory negligence, and if the trial counsel opposed such a charge, did he take a proper exception.

In reply to these issues, the court's attention is respectfully directed to the testimony of Miss Dawn Eustis, a Physical Therapist from the defendant hospital, in which she, in response to questions of the plaintiff's trial counsel, attempted to describe the physical appearance of the "Hubbard Tank" and its operating mechanism (Appdx 190-193); the testimony of the plaintiff on cross examination (Appdx 220-226), and the re-direct examination of Dr. Yaslow (Appdx 467-470), all of which sustain the theory that contributory negligence on the plaintiff's part could be inferred. Thus the plaintiff's counsel did not take an exception to the charge of contributory negligence.

The petitioner advances the argument that this petition is proper since the Court of Appeals for the Second Circuit has adopted a position "in clear conflict with the rules of the Court of Appeals for the Tenth Circuit". Thereupon he cites two cases as his authority, first, *General Motors Corp.* v. *Walden,* 406 F. 2d 606 (1969), and *Hartman* v. *Miller Hydro Co.,* 499 F. 2d 193 (1974). Both of these cases seem to involve requests to charge or excep-

tions to charges as given. In the instant case, neither requests to charge nor exceptions to charge regarding contributory negligence were taken by either side.

The next situation is subdivision (3) and raises the question as to whether the Court of Appeals for the Second Circuit so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for this court's power of supervision.

On this latter ground, the Court's attention is directed to *Rice* v. *Sioux City Cemetery,* 349 U.S. 70, 79, 79 L ed 897, 904 wherein it was stated:

> ". . . In the words of Mr. Chief Justice Taft, speaking for a unanimous Court:
>
> > 'If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit court of appeals.' *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U.S. 387, 393; 67 L ed 712, 714; 43 S. Ct. 422."

It is respectfully contended that where conclusions of the court of appeals depend on the appreciation of circumstances which admit of different interpretations, the Supreme Court will not interfere. *N.L.R.B.* v. *Pittsburgh S.S. Co.* (1951) 71 S.Ct. 453, 340 U.S. 498, 95 L. ed. 479.

In closing, the petitioner alleges that "the trial judge showed a distinct bias against the plaintiff." This state-

ment is attempted to be buttressed by excerpts from the trial record. However, petitioner's counsel was not present during the trial and, in fact, was not involved at all with either the petitioner or her trial counsel until the petitioner retained him for the processing of her appeal. Thus it is suggested that he is a poor judge of the atmosphere of the trial and the tone and tenor of the so-called "sarcasm" and "sexist" remarks of the trial judge.

The writer of this brief was the trial attorney for the defendant herein and was unaware of any animosity on the part of the judge towards either counsel and maintains that to urge such argument, the entire transcript involving five days of trial should be available instead of three short excerpts taken out of context.

The petitioner cites the case of *Krasowski* v. *Greyhound Lines, Inc.*, (C.A. Ohio, 1968), 402 F. 2d 445. A reading of this latter case discloses the appellate court's comments on the charge of the trial court at p. 447 as follows:

> " 'You have had a lot of experience in your life. You observed this driver and heard him talk. Would you figure he was gracious with these ladies or grumpy or grouchy?'
>
> "[The significance of determining whether the bus driver was 'gracious with these ladies' as opposed to being 'grumpy or grouchy' under the Court's rhetorical question would seem well calculated to prejudice at least female members of the jury]"

On the jury in the trial of the instant case, there were three women and, since the petitioner is a woman, it would seem that the alleged "sexist" remarks of the trial judge should have redounded in her favor before the jury. Thus the reasoning of the *Krasowski* case, supra, has little efficacy in the instant situation.

Wherefore, it is respectfully submitted that a writ of certiorari to the Court of Appeals in the Second Circuit be denied.

JOHN J. CULLEN
Attorney for Respondent
150 William Street
New York, New York 10038

MELE AND CULLEN
Of Counsel

Dated: March 5, 1975.